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Decision 00-09-007 September 7, 2000

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Coachella Valley Communications, Inc. (U-5117C), Complainant, vs. AMI Telecommunications Company of Nevada, Inc. and Morris Jacobs, Defendants.	Case 93-10-023 (Filed October 18, 1993; amended December 9, 1993, July 11, 1994, and December 8, 1994)

J. Michael Sunde, for Coachella Valley Communications, Inc., complainant.
Thomas J. MacBride, Jr. and Kathryn A. Fugere, Attorneys at Law, Goodin, MacBride, Squeri, Schlotz & Ritchie, for AMI Telecommunications Company of Nevada, Inc. and Morris Jacobs, defendants.

O P I N I O N

1. Summary

Complainant Coachella Valley Communications, Inc. (CVC) alleges that defendants AMI Telecommunications Company of Nevada, Inc. (AMI) and Morris Jacobs provided services as a public utility telephone corporation without

first having obtained Commission authorization to do so.[1] CVC further alleges that in so doing, AMI interfered with CVC's relationships with its customers. CVC seeks an order prohibiting defendants from providing such service and other, related relief.

In this decision, the Commission denies the relief sought by CVC and dismisses the complaint. The Commission also rules on requests for sanctions, intervenor compensation, and other motions. Case (C.) 93-10-023 is closed.

2. Background

2.1 Summary of Complaint

By this complaint, as amended on three occasions, CVC contends that AMI has provided interexchange telephone services subject to this Commission's jurisdiction without having first obtained a certificate of public convenience and necessity (CPCN) authorizing it to do so. In support of this contention, CVC alleges that AMI sold 1 plus and 0 plus long distance services; billed for those services; paid commissions to customers; did business under its own name and not that of Com Systems,[2] AMI's underlying long distance carrier; marked-up

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[1] At all times relevant herein, Jacobs was president and a principal shareholder of AMI. Hereinafter, reference to AMI includes both named defendants unless otherwise indicated.

[2] Also referred to herein as LDDS, LDDS/Metromedia, and LDDS/Com Systems. Decision (D.) 94-06-001 dated June 3, 1994 approved the merger of Com Systems Network Services, Inc. and other subsidiaries with their corporate parent, LDDS Communications, Inc. doing business as LDDS Metromedia Communications, Inc. (See also D.93-08-039.) CVC later asserted AMI used four underlying carriers. (Exhibit 19, p. 3.) AMI's president testified that 0 plus calls at issue are carried by LDDS/Com Systems, or, in some cases, by Tel-Trust, another certificated carrier. (Exhibit 20, p. 3.) The apparent discrepancy is explained by the fact that AMI operates in other states, and uses two other carriers elsewhere but not in California. (Tr. 86.)

costs billed by Com Systems; paid commissions to rental management companies or owners of rental units; employed salespeople; and used customers' names in its sales literature. CVC also alleges that AMI provided its telecommunications hardware free of charge. According to CVC, this indicates that AMI has an alternative source of revenue. CVC asserts the alternative source is long distance calling revenue.

Pursuant to its CPCN, CVC provides interexchange toll service to subscribers in California on a call-by-call basis. CVC claims that in pursuing the alleged activities, AMI has interfered with contractual relationships between CVC and its customers and has unlawfully caused those customers to cancel and/or repudiate otherwise lawful contractual relationships with CVC.

CVC also claims that AMI has not paid applicable taxes on long distance telecommunications services that AMI purportedly provides. Finally, CVC complains that AMI has failed to post instructions on customer phones identifying the long distance carrier as required by Federal Communication Commission (FCC) rules.

CVC requests injunctive relief preventing AMI from providing interexchange services; a finding that AMI is in contempt of Commission orders; imposition of fines and civil penalties; reparations; an order requiring Com Systems to locate, identify, and disconnect all services unlawfully used to transport interexchange traffic by AMI; and a requirement that AMI backbill for all past switched access taxes on AMI's billings.

2.2 AMI's Answer

AMI contends that it does not provide intrastate interexchange services, and denies that it is engaged in business activities subject to this Commission's jurisdiction. Instead, AMI alleges, it provides specialized telecommunications

hardware to a narrowly defined market, i.e., condominium associations whose members lease their property to vacationers most of the year. According to AMI, this equipment blocks 1 plus long distance calling, thereby protecting owners from being charged for long distance calls placed by vacationers. The equipment permits vacationers to make 0 plus and 0 minus calls over the network of a certified presubscribed carrier, Com Systems, or across the network of another carrier. Unless otherwise routed, vacationers' calls are "branded" by Com Systems, and Com Systems, not AMI, bills end-user vacationers for the 0 plus and 0 minus calls routed over Com Systems' network.

AMI admits that it rebilled owners of certain rental units for a *de minimus* amount of 1 plus calls for a limited time in 1993, but denies that this constituted the provision of regulated service. AMI explains that during the few weeks of the year when owners occupy their vacation rental properties, they often request that AMI unblock the 1 plus access to permit direct dial long distance calling, a service which AMI provides as a courtesy. Due to the configuration of the network, these 1 plus calls were placed over Com Systems' network but billed to AMI. Starting in April 1993, AMI rebilled unit owners on a "pass-through" basis (without markup) for the interexchange services provided by Com Systems. AMI contends that it believed in good faith that it acted in conformance with the Commission's rules and regulations when rebilling these users for services, and that the volume of calls was a minimal amount, approximately $5000. AMI states that it ceased billing functions in October 1993.[3]

[3] Evidence adduced at hearing established that AMI resumed billing for 1 plus calls in April 1994 (Exhibit 20, p. 22 and Attachment C), and again ceased such billing by January 1, 1995 (Exhibit 3, p. 3.)

AMI also admits that it provides certain telecommunications hardware free of charge, but denies any implication that this means that AMI must derive revenue from regulated services. AMI alleges that its primary source of revenues is commissions from certificated carriers that pay AMI based on AMI's marketing and sale of their services to the public.

2.3 Procedural Context and History

For a dispute involving two small providers of telecommunications products and services, the proceeding drew heavily on the Commission's resources. The documents filed in this docket include the original complaint and three amendments; 15 motions and associated responses and replies; an initial and amended compensation request by CVC and responses by AMI; nine notices of ex parte communications; and ten Administrative Law Judge (ALJ) rulings. Altogether, the docket card for this matter contains no less than 88 entries. In part, this volume of pleadings is reflective of the unusual degree of acrimony between the parties in this proceeding.

A series of telephone conference calls among the ALJ and the parties were initiated. These included three publicly noticed telephone prehearing conferences (PHCs). A PHC by personal appearance was held on February 9, 1995. In an effort to avoid unnecessary litigation, and at AMI's suggestion, the ALJ Division provided the services of an ALJ who acted as the evaluator for an Early Neutral Evaluation process. Numerous law and motion hearings before a third ALJ were held to resolve discovery disputes.

An evidentiary hearing was held on July 10, 1995. Afterwards, at the request of complainant's president, the schedule for briefing and submission of the proceeding was deferred to give CVC an opportunity to retain substitute

counsel.[4] This request, and CVC's subsequent failure to retain substitute counsel, required the issuance of three additional ALJ rulings. By the latest of those rulings (ALJ's Ruling dated October 12, 1995) the matter was submitted without further opportunity for briefing.

This proceeding was filed before January 1, 1998, and is not subject to the provisions of Article 2.5 of the Commission's Rules of Practice and Procedure (Rules). No comments on the proposed decision were filed. We adopt the findings, conclusions, and order set forth in the proposed decision.

3. Preliminary Matters

3.1 November 19, 1993 Motion to Dismiss

On November 19, 1993, AMI filed a motion to dismiss the complaint on the grounds that the complaint failed to allege that AMI was engaged in conduct subject to regulation. AMI also urged dismissal on the grounds that the complaint failed to comply with that portion of Rule 10 which provides that "a complaint which does not allege that the matter has first been brought to the staff for informal resolution may be referred to the staff to attempt to resolve the matter informally." In addition, AMI requested denial of CVC's request for relief in the form of a temporary restraining order or preliminary injunction. Finally, AMI requested dismissal of CVC's claim for reparations, noting that the

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[4] CVC's representative in this matter, J. Michael Sunde, became unavailable for representation of CVC shortly after the hearing but before the date set for filing briefs. On July 26, 1995, the United States Attorney for the Eastern District of California announced through a press release that it had filed a criminal complaint charging Sunde with mail fraud and blackmail in connection with an attempt to extort money from the owner of a small California telephone company. According to the press release, Sunde was arrested on those charges on the previous day.

complaint did not allege that AMI had charged CVC anything within the meaning of Section 734, which governs reparations.[5]

The ALJ issued a ruling on October 25, 1994 that deferred consideration of AMI's motion to dismiss the complaint pending hearings. The ruling also: (1) determined that CVC had failed to demonstrate that it would likely prevail on the merits of the case, and on that basis denied CVC's request for preliminary relief; (2) denied AMI's motion to refer the dispute to the staff for informal resolution under Rule 10; (3) excluded CVC's request for reparations from the scope of hearings; and (4) resolved other procedural and ministerial matters.

We affirm the ALJ's ruling. With respect to the ruling's deferral of the motion to dismiss the complaint, we note that the Commission has declined to summarily dismiss a complaint even though, as here, it was inartfully drawn. (*Dolphin Tours v. Pacifico Creative Service, Inc. et al.* (1979), D.91084, 2 CPUC2d 565, 568-569). The Commission has also stated a preference for taking up motions to dismiss along with the underlying matter in a single decision after hearing. (*TTT Inc. v. Pyramid Commodities, Inc., et al.* (1988), D.88-08-031, mimeo., p. 5, 28 CPUC2d 610). As the Commission stated in *Creighton J. Jones v. PT&T Co.*, (1977) 82 CPUC 90, complaint allegations that merely suggest or imply the violation of a Commission order can be sufficient for maintaining a complaint action in lieu of dismissal. Where it determined that a complainant had "raised some issues against certain defendants that merit more investigation instead of outright dismissal," the Commission proceeded to hear a complaint even though it had expressed reservations about the potential for abuse of the complaint process, and had recognized the severe negative impact of complaint proceedings on

5 All statutory references herein are to the Public Utilities Code.

litigants' as well as on its own resources. (*Westcom Long Distance, Inc. v. Pacific Bell, et al.* (1994) D.94-04-082, 54 CPUC2d 244, 253 (*Westcom*).)

We make this affirmation while recognizing that there will be the occasional case where we eventually determine that it would have been preferable to dismiss the complaint upon motion made at the outset of the proceeding. In general, we seek to maintain a complaint process that is accessible to the public not only for customer complaints, but also for disputes among competitors. This generally means that we will continue to liberally construe complaints that present a plausible cause of action.[6] Among other things, we will be open to considering credible allegations that a person or corporation is providing jurisdictional public utility services without first having obtained the requisite authority to do so.

There is of course a downside to this policy. Parties with an overzealous willingness to pursue their own interests with indifference to broad consumer and public interests may find added encouragement to take undue advantage of our process by filing harassing or otherwise unwarranted actions. We are aware that such actions can impose significant costs on defendants and the Commission itself, while the complainant who initiates such an action may incur relatively little cost or risk. Fortunately, instances of outright abuse of process occur infrequently in our experience. Our preferred course is not to retreat from our policy of maintaining an accessible process, but instead to maintain a vigilant

6 We note that Westcom's "investigator/manager/litigator" and president is J. Michael Sunde, who is also CVC's representative in this matter. (*Id.*) Our experience with the prosecution of these complaint cases by Sunde suggests that it could be inappropriate to apply the liberal construction rule in any future cases he may bring.

watch for actions of those who would abuse our process, and to impose sanctions when instances of such abuse have been found.

We take up the substance of AMI's motion to dismiss in addressing the merits of the case. However, there is no basis for considering CVC's request for reparations. As we stated in *Westcom, supra*, "Section 734 makes clear that any reparations that may be due is between the serving public utility and its customer." (54 CPUC2d 244, 252.) CVC has neither alleged nor proven that it is an AMI customer, or that AMI has overcharged it for its services. We grant AMI's motion to dismiss CVC's request for reparations. Also, we will not consider CVC's request that we require Com Systems to locate, identify, and disconnect services used to transport AMI traffic, since Com Systems is not a party to this proceeding.

3.2 Supplemental Motion to Dismiss

On October 20, 1994 AMI filed a supplemental motion to dismiss in light of the Commission's October 12, 1994 order in *Michael Murray et al. v. Communications Services, Stanford University and Pacific Bell* (1994) D.94-10-032, 56 CPUC2d 583 (*Murray v. Stanford*). We address the significance of *Murray v. Stanford* for this proceeding in the discussion of the merits of the complaint.

3.3 Motion to Disqualify CVC's Representative

By motion filed on February 16, 1995, AMI asks that the Commission require CVC to participate in discovery and appear in hearings through a California-licensed attorney. Basically, AMI asks the Commission to disqualify CVC's representative J. Michael Sunde, who is not licensed to practice law in California, from representing CVC. In making this request, AMI relies on the grounds that, notwithstanding established Commission practice that allows

participation by nonattorney representatives, Section 1706 requires that parties be represented by licensed attorneys.[7]

CVC finds nothing in the language of Section 1706 that would restrict Sunde's representation of CVC, and finds support for such representation from other sources. Among other things, CVC notes that the Commission's former Rule 4 required pleadings to be signed by either the attorney *or* representative of a party. Also, CVC observes that in *Consumers Lobby Against Monopolies v. Public Utilities Commission* (1979) 25 Cal.3d 891, 914 (*Consumers Lobby*), the Supreme Court took note of the fact that this Commission regularly allows participation by nonattorneys in a representative capacity.

The California Attorney General considered this issue in the August 5, 1997 *Opinion of Daniel E. Lungren, Attorney General, No. 97-049* (AG Opinion). The AG Opinion, issued in response to a request by State Senator Charles M. Calderon, considered the following question:

> "May an individual who is not a member of the State Bar of California represent a party, including the preparation of pleadings and the making of appearances, with respect to a formal proceeding before the California Public Utilities Commission?" (*Id.*, p. 1.)

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7 Section 1706 provides in relevant part that, in any formal hearing, "the parties shall be entitled to be heard in person or by attorney." Section 1706 was amended effective January 1, 1999 (Stats. 1998, Ch. 886), but that amendment did not affect the cited language. Initially, AMI also contended that disqualification of Sunde was desirable as a matter of public policy and would help to prevent the unauthorized practice of law. However, in its March 9, 1995 reply to CVC's opposition, AMI stated that "the narrow issue framed by AMI's Motion is whether Section 1706 requires Complainant, a corporation, to be represented by an attorney." (*Reply of AMI*, p. 2.) With respect to AMI's motion, we focus here on the legal arguments on the meaning of Section 1706, not the broader policy issues.

The AG Opinion answered this question in the affirmative after considering the central question of whether the language of Section 1706 means that a party may be heard in a formal hearing only in person or by attorney. The AG Opinion finds that taken literally, Section 1706 neither entitles nor prohibits representation by a nonattorney. It also recognizes that an expansive interpretation allowing representation by an unlicensed person would arguably violate the interpretive rule that the specification of particulars implies the exclusion of others. The AG Opinion nevertheless rejected the argument that nonattorneys cannot represent parties in Commission hearings for the following reasons:

1. **Commission Powers**. Pursuant to its "plenary power . . . to confer additional authority and jurisdiction upon the commission . . . " (Cal. Const., art. XII, Section 5), the Legislature has conferred on the Commission authority to "do all things, whether specifically designated in [the Public Utilities Act] *or in addition thereto*, which are necessary and convenient" in the supervision and regulation of every public utility. (Section 701, italics added.) Further, the Commission's powers have been liberally construed. (*Consumers Lobby*, *supra*, 25 Cal.3d 891, 905.) The AG Opinion concludes that "such considerations suggest that any legislative intent to restrict the power of the PUC would be expressly stated and not left to mere implication. Accordingly, while the PUC is constitutionally authorized '[s]ubject to statute and due process . . . [t]o establish its own procedures . . . ' (Cal. Const., art. XII, Section 2), we perceive nothing in Section 1706 that would negate the PUC's power to authorize representation at a formal proceeding by a nonattorney." (*AG Opinion*, p. 3.)

2. **Supreme Court Approval of Commission Practice.** In *Consumers Lobby*, *supra*, 25 Cal.3d 891, the question before the court was whether the Commission was authorized to award fees and costs to a nonattorney appearing in a

representative capacity in a reparations proceeding. The court observed that in Commission proceedings, in contrast to judicial proceedings, it is common for nonattorneys to make appearances on behalf of others; further observed that a brief perusal of the Commission Reports demonstrates that appearances by nonattorneys comprise a substantial and important part of the practice before that body; and inferred that the Commission believes that such persons are competent to participate in its proceedings in a representative capacity. (Id., pp. 913-914.) The AG Opinion rejects the suggestion that the court's observations are merely dicta lacking precedential significance. The AG Opinion recognizes that dicta consisting of general observations of law which go beyond the facts of a case are not authoritative, and that cases are not authority for propositions not decided. However, the AG Opinion finds that the court's discussion in question was not extraneous, and constituted a point actually decided by the court: "The authority of the PUC to award fees to a representative must clearly be founded in the first instance upon the authority of the representative to perform that service. Accordingly, we consider the court's discourse to be relevant, considered, and decided." (AG Opinion, p. 4.)

3. **Legislative Approval**. Legislation providing for the award of fees for parties' representatives in formal Commission proceedings, enacted after the *Consumers Lobby* case (Sections 1801, *et seq.*) uses the term "advocate's fees" in lieu of "attorneys fees." This indicates "that the Legislature was cognizant of and approved the participation of nonattorneys in such proceedings." (*AG Opinion, p. 4.*)

4. **State Court Approval of Nonattorney Practice before Administrative Agencies**. While an appearance for and preparation of pleadings on behalf of another is an inherent aspect of the practice of law, even if conducted before an administrative agency, and "[n]otwithstanding the absence of any specific judicial decision respecting the practice of law by nonattorneys before administrative tribunals where such

> practice is authorized by statute [citations omitted.], the fact is that such practice has been long recognized by the courts of this state. [Citations omitted.]" (*AG Opinion, pp. 4-5.*)

The foregoing analysis in the AG Opinion is persuasive, and we hereby adopt it as our own. AMI's motion to disqualify CVC's representative on the grounds that he is not licensed to practice law in California is denied.

3.4 AMI's Motion for Sanctions

On March 9, 1995, AMI filed a motion for the imposition of sanctions on CVC. This request arises in response to CVC's assertedly "malicious accusation that AMI is engaged in criminal conduct." (Motion for Sanctions, p. 1, emphasis in original.) AMI seeks sanctions in the form of reimbursement for its cost of preparing the motion for sanctions and related correspondence, and dismissal of the complaint. According to AMI,

> "Sanctions are the appropriate responses to the disrespect CVC has displayed for this Commission's forum as well as CVC's tacit announcement of its intent to pursue this proceeding in an as bombastic and vitriolic a fashion as possible." (*Id.*, p. 1.)

AMI refers to a February 24, 1995 letter from CVC representative J. Michael Sunde, addressed to the ALJ and copied to the assigned Commissioner and the Commission's General Counsel, in which Sunde stated the following:

> "Furthermore, defendants admit that they collected taxes from their customers [footnote omitted], money they have retain (sic) for their own benefit in violation of Commission rules. Such an admission is tantamount to admitting to have committed unlawful and likely criminal acts." (*Letter from J. Michael Sunde, representative for complainant*, February 24, 1995, emphasis in original.)

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> "Having not been lawfully certificated, AMI has not paid these same taxes into the appropriate taxing authority, but has rather chosen to abscond with the money." (*Id*, emphasis in original.)

AMI notes that collecting and retaining tax revenues for one's own benefit and absconding with tax revenues would be felonies under state and federal tax laws. AMI maintains that neither CVC nor Sunde had any basis for making such accusations when Sunde sent the February 24 letter. AMI points out that it has maintained throughout this proceeding that its billing of 1 plus traffic, including taxes, has been on a pass-through basis, and that any applicable taxes rebilled by AMI were paid to the interexchange carrier that handled the traffic. According to AMI, the fact that CVC does not believe AMI in this regard does not permit CVC to accuse AMI of actions representing felonies.

CVC responds that it was justified in making the accusations. CVC claims that AMI is a "switchless reseller," and notes that in D.92-06-069, the Commission held that a switchless reseller can be a public utility even though its does not own or physically operate a switch.

CVC's switchless reseller claim goes to the central issue of AMI's asserted public utility status, and has little bearing on its accusation that AMI feloniously absconded with or withheld tax revenues. We find that when CVC sent the February 24, 1995 letter, it had no reasonable basis for making accusations that AMI had unlawfully or criminally absconded with or kept tax revenue for its own benefit.[8] At best, the accusations were based on incomplete information.

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8 We recognize that in the amended complaint, CVC raised the allegation that AMI had not paid applicable taxes on the telecommunications services it purportedly provided. However, we find a clear distinction between that claim and the inflammatory accusations raised by CVC in the February 24 letter.

More likely, they were based on sheer speculation. Moreover, even if there had been sufficient factual basis for the accusations, leveling them against defendants informally, in a letter to Commission decisionmakers, was not a proper procedure for making any relevant information available to the Commission.[9] CVC's February 24 letter can best be seen as an attempt to influence decisionmakers through prejudicial, off-the-record statements consisting largely of innuendo. In short, although pleadings abound in this matter with gratuitous statements reflecting the rancor between the parties, and we are prepared to ignore such statements, CVC's letter crossed the line of propriety. We are not prepared to ignore the statements therein.

The Commission's Rule 1 governs in such situations. Among other things, Rule 1 imposes upon litigants and others conducting business with the Commission an affirmative obligation to "maintain the respect due to the Commission, members of the Commission and its Administrative Law Judges." We find that the above-described action of CVC and its representative constitutes disrespect for the Commission's processes in contravention of Rule 1. Such actions poison the atmosphere of already-difficult litigation conditions, and divert attention and limited resources from the resolution of legitimate disputes. Accordingly, an order for sanctions against CVC is both within the Commission's discretion and warranted under the circumstances.

AMI's requested sanctions are, in part, appropriate. We will order CVC to pay AMI the direct cost of the preparation of the motion for sanctions, up to a maximum of $2,000. We deny AMI's request for including the cost of associated

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9 At the time, Article 1.5 of the Rules permitted ex parte communications in enforcement proceedings up to the date of submission. Article 2.5, now prohibits ex parte communications in any adjudicatory proceeding inititated after January 1, 1998.

correspondence in sanctions, as such correspondence does not add materially to our decisionmaking processes. We also deny AMI's request to include dismissal of the complaint as a sanction, since such a remedy is disproportionate to the offense in this case.

To give effect to this order, we direct AMI to file, within 10 days of the effective date of this order, a statement of the direct costs incurred by its attorney in preparing the motion for sanctions. AMI may also include reasonable costs of preparing the cost statement. Within 20 days thereafter, CVC shall pay such costs to AMI.

3.5 CVC's Request for Sanctions

In a pleading filed on November 3, 1994, CVC responded to AMI's October 20, 1994 supplemental motion to dismiss, filed by AMI on the basis of the Commission's decision in *Murray v. Stanford*, and requested sanctions against defendants. (*Complainant's Response to Supplemental Motion of AMI to Dismiss Complaint and Request for Sanctions*.) In this section, we consider CVC's request for sanctions against AMI.

As grounds for the requested sanctions, CVC argues that AMI's repeated filing of motions to dismiss with citation to Section 234 was "frivolous and tend[ed] to delay these proceedings by tieing (sic) up valuable time to answer the motion, time that might otherwise be spent on discovery." (*Response*, p. 13.) According to CVC, AMI's filing of motions in reliance on Section 234 was abusive. CVC further complains that,

> "Defendants will have this Commission believe that defendants' counsel believes PUC Section 234 really applies to the case at bar, when any first year law student would realize that 234 is not applicable." (*Id.*)

We find this request to be without any merit. CVC may be entitled to argue its position on the applicability of Section 234 to this proceeding in light of *Murray v. Stanford*, but it has failed to show that AMI's contrary view is so self-evidently wrong that to adopt it and advocate it before the Commission warrants sanctions against the adopting party. The request is denied.

3.6 Compensation Request

In reliance on former Article 18.7 of the Rules, CVC filed a notice of intention to claim compensation on October 14, 1994. AMI filed a response on November 14, 1994. Article 18.7 was repealed by Decision 93-05-040 dated May 19, 1993. The October 14 filing will not be given further consideration.

CVC filed an "Amended Request for Findings of Eligibility for Compensation (Notice of Intent to Claim Compensation)" on February 16, 1995. CVC believes that it may be eligible for compensation from one of three possible sources: a common fund of reparations or other funds, the Advocates Trust Fund, or Article 18.8 of the Rules and Sections 1801-1812. AMI filed a response to the amended request on March 15, 1995.

On June 15, 1995, pursuant to Section 1804(b)(1), the ALJ issued a ruling addressing the third potential source of compensation identified in CVC's request. The ALJ determined CVC is not a "customer" within the meaning of Division 1, Part 1, Chapter 9, Article 5 (beginning with Section 1801), and that CVC had not shown that participation in the proceeding would pose a significant financial hardship. CVC was ruled ineligible to claim compensation under Article 18.8 of the Rules and Sections 1801-1812.

We affirm the ALJ's ruling. Even though CVC claims that it only prosecutes this case for the benefit of all California ratepayers and to enforce compliance with various Commission rules and California laws and statutes, the

plain facts are otherwise. CVC has made allegations to the effect that it is a competitor of the defendants, and that it has been harmed by defendants' alleged actions. CVC's principal witness testified that the complaint was filed to prevent AMI from taking CVC's customers. (Tr. 17.) There is no basis for finding that CVC is a customer for purposes of the statutory program of intervenor compensation.

For CVC to be eligible for compensation from a common fund, the Commission would have to find that CVC is an advocate of the public interest. However, as a reading of the amended complaint and the evidentiary record clearly shows, CVC is seeking to address its own narrow business interests in this case. At best, CVC only incidentally seeks to vindicate any consumer or public interest. Moreover, "the common fund doctrine is tailored so that attorneys fees are awarded in only the most meritorious cases." (*Consumers Lobby*, 25 Cal.3d 891, 908.) Even if CVC were to prevail on one or more of the substantive claims that it has brought before the Commission, there is no basis for finding that CVC has presented a "most meritorious" case. CVC's request under the common fund theory therefore fails.

In *Consumers Lobby Against Monopolies v. PT&T Co.*, (1981) 6 CPUC2d 374, the Commission discussed the criteria that it would apply when making awards of compensation from the Advocates Trust Fund. The Commission adopted a suggestion to deny awards:

> "[W]here a party's own economic interest is sufficient to motivate participation. This test would exclude substantial customers of utility services or parties seeking to preserve or obtain some competitive position." (*Id.*, p. 379.)

As noted above, CVC represents itself as a competitor of AMI that has been harmed by AMI's actions. CVC fails the economic interest test, and is not eligible for compensation from the Advocates Trust Fund.

3.7 Motion for Adoption of Stipulations

On May 30, 1995 CVC and AMI filed a joint motion for adoption of proposed stipulations of certain facts. The moving parties represent that the stipulations were reached at the urging of the Law and Motion ALJ, and that acceptance of the stipulations would expedite litigation.

In accordance with Rule 51.6(c), the proposed stipulations were subsequently offered and received in evidence as Exhibit 3. Therefore, no action on the motion is required.

4. Substantive Issues

4.1 Is AMI a Public Utility Requiring Commission Authority?

4.1.1 Legal Framework for Public Utility Status

The central substantive question before us is whether the business activities of AMI constitute those of a public utility telephone corporation, requiring it to obtain a CPCN pursuant to Section 1001 before lawfully pursuing those activities. If CVC does not meet its burden of proving facts showing that the activities are those of a public utility, we will dismiss this complaint.

Ultimate authority for determining whether a person or corporation is a public utility comes from Article XII, Section 3 of the California Constitution:

> "Private corporations and persons that own, operate, control, or manage a line, plant, or system for the… transmission of telephone… messages… directly or indirectly to or for the

public… are public utilities subject to control by the Legislature."

Section 216 (b)[10] provides in relevant part that:

"Whenever any… telephone corporation… performs a service for, or delivers a commodity to, the public or any portion thereof for which any compensation or payment whatsoever is received, that… telephone corporation… is a public utility subject to the jurisdiction… of the commission and the provisions of this part."

Section 234[11] defines telephone corporations as follows:

(a) "Telephone corporation" includes every corporation or person owning, controlling, operating, or managing any telephone line for compensation within this state.

(b) "Telephone corporation" does not include any of the following:

(1) Any hospital, hotel, motel, or similar place of temporary accommodation owning or operating message switching or billing equipment solely for the purpose of reselling services provided by a telephone corporation to its patients or guests.

(2) Any one-way paging service utilizing facilities that are licensed by the Federal Communications Commission, including, but not limited to, narrowband personal communications services described in Subpart D (commencing with Section 24.100) of Part 24 of Title 47 of the Code of Federal Regulations, as in effect on June 13, 1995.

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10 Section 216 was amended after this complaint was filed (Stats. 1996, Ch. 854), but the amendment did not affect the quoted language.

11 Section 234 was also amended after this complaint was filed. (Stats. 1995, Ch. 357.) The amendment added the exemption for one-way pagers, and changed the format without materially changing the substance of provisions applicable to this proceeding.

Under Section 216, we must find that both of two conditions are satisfied to find that AMI is a public utility. First, AMI must fall within the statutory definition of a telephone corporation in Section 234. Second, we must find that AMI provided telephone service, for compensation, to the public or a portion thereof. In addition, we apply the judicially created doctrine of dedication. This doctrine holds that businesses may fall within the statutory definition of a public utility and yet not be subject to our regulation if they have not dedicated their property to public use. (*Richfield Oil Corp. v. Public Utilities Commission* (1960) 54 Cal. 2d 419.) A finding of dedication to public use is not a trivial thing, and requires evidence of an unequivocal intent to dedicate. (*California Water and Telephone Co. v. Public Utilities Commission* (1959) 51 Cal. 2d 478, 494.) Dedication is a factual inquiry. (*City of Long Beach v. Unocal California Pipeline Co.* (1994) 54 CPUC2d 422, 428.) See also *Donna Matthews v. Lakeside Water Company* (1991), 41 CPUC2d 477 and *Pacific Gas and Electric Company v. Dow Chemical Company* (1994) 55 CPUC2d 430.

We also look to two decisions (D.92-06-069 and D.93-05-010) that were issued in R.85-08-042, a rulemaking proceeding in which the Commission considered tariff filing rules and other regulations governing certain telecommunications utilities. Addressing policies for regulation of nondominant interexchange carrier (NDIEC) resellers, in D.92-06-069 the Commission noted that the California Supreme Court's repeatedly affirmed test of dedication is "whether or not those offering the service have expressly or impliedly held themselves out as engaging in the business of supplying [the commodity or service at issue] to the public as a class, not necessarily to all the public, but to any limited portion of it, such portion, for example, as could be served from his system…" (44 CPUC2d 747, 750, quoting *S. Edwards Associates v. Railroad Commission* (1925) 196 C. 62, 70.) The Commission then noted that "[e]ach

dedication case turns on a review of the specific facts presented" and that "any individual company may contest its inclusion within the class of regulated businesses at issue and argue that it had not dedicated its property to public use." (*Id.*) Thus, the long-standing dedication test will be applied to switchless resellers.

Addressing the irrelevance of whether a reseller carrier owns and operates a switch to its public utility status, the Commission held in D.92-06-069 that "[f]rom the customers' viewpoint, the switchless reseller is the telephone company; it orders the establishment of service to the customers' premises and controls the rates that will be charged, and is the business they will look to when problems arise." (*Id.*)

In D.93-05-010 (49 CPUC2d 197), the Commission described this form of public utility as follows: "In simplified terms, a switchless reseller purchases wholesale long-distance capacity from AT&T or a facilities-based NDIEC and resells the service at retail to its customers." (*Id.*, 199.) The Commission then adopted three operating characteristics that define switchless reseller operations. The third of these characteristics, most relevant here, provides that "the switchless reseller's customers, as distinguished from customers who deal with an agent, view the reseller as their telephone company." (*Id.*, 201.)

Based on the above-described framework for determining public utility status of businesses generally and of switchless resellers specifically, we will look for evidence that AMI is engaged in the business for compensation of purchasing wholesale long-distance capacity from a facilities-based NDIEC and reselling the service at retail to its customers. We will also look for evidence that AMI orders the establishment of service to the customers' premises *and* controls the calling rates that will be charged, and that AMI's customers or end-use callers view AMI as their telephone company. As we do so, we will also consider the question of

dedication, i.e., whether AMI expressly or impliedly holds itself out as engaged in the business of providing telephone service as a switchless reseller. We will first address AMI's contention that it is not a telephone corporation by virtue of the statutory exemption in Section 234.

4.1.2 The Section 234 Exemption

In *Murray v. Stanford, supra*, 56 CPUC2d 583, the Commission determined that Stanford University's operation of a telephone system providing service to students living in Stanford-owned campus housing did not constitute the operations of a public utility subject to the Commission's jurisdiction. Among other things, the Commission agreed with the contention that Stanford's telephone system fell within the Section 234 exemption for hospitals, hotels, motels, and similar places of temporary accommodation owning or operating message switching or billing equipment solely for reselling services provided by a telephone corporation to its patients or guests. (*Id.*, 591.) The Commission based this conclusion in part on its determination that Section 234 should be read in conjunction with Section 741.2, which provides in part that nonpublic utility providers of telephone services, including hospitals, hotels, motels, universities, and similar places of temporary accommodation, need not file or maintain tariff schedules. (*Id.*, 592; also, Conclusions of Law 7 and 8, 596.)

AMI contends that we need look no further than Section 234 as construed in *Murray v. Stanford* to find that it is not a telephone corporation. The crux of AMI's interpretation of *Murray v. Stanford* is as follows:

> "[T]he California Legislature has determined that the provision of telephone services to occupants of 'places of temporary accommodation' is not subject to regulation by this Commission." (*Supplemental Motion of AMI to Dismiss Complaint*, p. 1.)

AMI provides inadequate justification for this contention, and it seems to confuse provision of telephone service *to* occupants of places of temporary accommodations with service *by* those places. The exemption approved in *Murray v. Stanford* is not so broad that all telephone service directly or indirectly associated with the operation of a telephone system by a place of temporary accommodation for its guests or tenants is exempt. If a Stanford student makes a long-distance call through Stanford's exempt system, the serving long distance carrier does not become exempt merely because the call goes through an exempt system. We note that AMI does not claim that Com Systems is exempt from regulation by virtue of the fact that the calls at issue in this proceeding go through a system operated by a condominium or timeshare management company, yet that would be a logical extension of its argument.

AMI's president testified that AMI is an agent for the unit owners that order the presubscribed long distance services to the units. (Exhibit 20, p. 9.) However, he also testified that he is not an attorney, and is not familiar with the legal consequences of the term "agent." (*Id.*, p. 18.) The foregoing assertion of an agency relationship does not allow us to conclude that AMI is a place of temporary accommodation. AMI has not shown that it is exempt from regulation as a public utility simply because its customers may be places of temporary accommodation.

4.1.3 Is AMI a Switchless Reseller?

The crux of CVC's complaint is the contention that AMI is a switchless reseller. CVC witness Otis Cranford testified (Exhibit 19, p. 2) that AMI's customers are generally real estate management companies that provide services to condominium owners or, occasionally, the unit owner themselves. The end-use callers who ultimately place long distance calls through facilities provided by

AMI are not AMI customers. This evidence introduced by CVC is consistent with, and even appears to corroborate, AMI's own description of its operations as a provider of specialized telecommunications hardware to condominium associations whose members lease their property to vacationers most of the year.

Many of CVC's proffered facts are of little dispositive value. For example, CVC makes much of the fact that AMI employed sales personnel, but such information adds nothing of probative value to the analysis of whether AMI is a public utility. Similarly, the fact that AMI refers to existing customers in its sales literature does nothing to illuminate CVC's claims of public utility status for AMI, nor does the fact that AMI does business in its own name. In general, there is a pattern of disconnection between CVC's claims of public utility status and the hard facts it was able to prove.

Cranford described a collection of AMI promotional literature (Exhibit 1) in apparent support for CVC's claims of public utility status for AMI. But a review of that literature, taken as a whole, reveals little support for CVC's position in this case. For example, AMI described itself to potential condominium management company customers as a provider of sales, marketing, product design, and customer service to the long distance and operator service industry. This does not demonstrate that AMI held itself out as a long distance provider. Providing service *to* an industry is not the same thing as providing service *as a member of* an industry. Sales literature in Exhibit 1 also states that AMI has designed a call restriction network that allows owners of condominiums and timeshares to offer long distance telephone service to guests without the risk of those long distance calls being billed to the owners. Again, this is consistent with the description of AMI's operations that AMI itself has advanced in this proceeding, and does little to advance the theory that AMI resells interexchange service purchased from another carrier. The sales literature

in Exhibit 1 does state that AMI "will provide the long distance network," which could be construed as support for CVC's claims. However, arranging for service by Com Systems or another carrier is not enough to make AMI itself a carrier. Exhibit 1 does not clearly demonstrate that AMI sold and rebilled long distance telephone service, or offered to do so.

Cranford also described the standard form of agreement between AMI and its customers (Exhibit 2) to buttress CVC's claim that AMI is a public utility. However, the description of the agreement offered by Cranford falls short of an analysis that supports CVC's theory of public utility status. A review of Exhibit 2 itself shows that the agreement can be read as being consistent with AMI's claims of being a provider of call blocking services.

AMI and the property managers receive commissions from the long distance carrier for revenues derived by the carrier from 0 plus dialing. However, the receipt of commissions by unregulated entities is not uncommon. Stores that sell cellular telephones receive commissions from cellular telephone companies. Drugstores that sell prepaid calling cards receive commissions from the card issuer. Thus, the fact that AMI receives commissions from the providing long distance carrier is of little consequence.

CVC has also failed to present and prove sufficient facts showing that AMI, as opposed to Com Systems and other certificated carriers, controls the California intrastate interexchange calling rates charged to end use-callers in condominiums served by AMI's blocking equipment. Nor has CVC shown that anyone (whether condominium and timeshare owners and management companies, or the tenants and guests who make long distance calls from the units where AMI has placed equipment) views AMI as their telephone company. There appears to be little reason why they might be expected to do so.

With respect to 0 plus calls placed from rental units served by AMI, there is no evidence that AMI has billed anyone for such calls. Moreover, AMI's president testified that the serving carrier, Com Systems or Tel-Trust, rates, routes, and bills for such calls. (Exhibit 20, p. 3.) He further testified that "AMI does not, nor has it ever, billed anyone for a 0+ call." (*Id.*) Exhibit 4 corroborates this evidence. We find no evidence that AMI was or is a reseller of 0 plus calls. Thus, the question of AMI's public utility status turns on its activities with respect to 1 plus calls.

CVC and AMI stipulated that AMI billed for 1 plus calls from April to October 1993 and from April to December 1994, and that all such calls placed after January 1, 1995 and completed through AMI's systems were billed by the local exchange carrier. We find that such rebilling was incidental to AMI's primary business of providing call blocking equipment and receiving commissions from long distance carriers. The systems provided by AMI allow unit owners to bypass or override the blocking of 1 plus calls for the few days or weeks of the year when they occupy their own units. AMI rebilled for these 1 plus calls only during limited periods of time, and only because it began to incur considerable expense for those calls due to the configuration of the equipment and the interexchange carrier's changed billing practices. AMI learned of the interexchange carrier's intent to bill AMI for the costs of 1 plus calls in 1992, but did not immediately begin billing unit owners for those costs. It was only later, when the amount of 1 plus calling grew, that AMI determined it had no reasonable alternative to rebilling the costs that it was incurring.

In conclusion, the record evidence supports AMI's claim that its primary business is that of a specialized telecommunications equipment provider to condominium owners or management companies. AMI only incidentally, and for a limited time in 1993 and 1994, billed the unit owners for 1 plus services that

could possibly be construed as regulated services. AMI did not want to provide this limited 1 plus billing, and took steps to avoid doing so. Moreover, AMI did not mark up the costs, but simply attempted to pass through the costs it was incurring.[12] AMI clearly did not set itself up as a business to purchase 1 plus calling capacity at wholesale and resell it at retail. The evidence does not show that AMI held itself out as a business to provide such service to the public or any portion thereof for compensation. It has not been shown that AMI dedicated its facilities to public use with respect to 1 plus calls. AMI is not a public utility subject to this Commission's jurisdiction.

4.2 Did AMI Fail to Pay Applicable Taxes?

The second issue raised by CVC is whether AMI has paid all applicable taxes associated with 1 plus telephone calls that it billed to unit owners. AMI assumed that Com Systems billed AMI for all applicable taxes in the same manner that it billed its other customers, and notes that it has always paid Com Systems' bills in full. There is no showing that AMI is responsible for the payment of taxes associated with the 1 plus calls that it billed to unit owners in 1993 and 1994. Moreover, there is no reason to hold AMI responsible for auditing the interexchange carriers' compliance with applicable tax requirements, yet that is what CVC's complaint implies should be done. We deny this component of the complaint.

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[12] CVC attempts to show that AMI profited from rebilling because the calls were billed by the interexchange carrier in one-tenth minute increments, but AMI rebilled at rates per minute. The evidence shows otherwise. AMI collected only a fraction of the amounts it billed for 1 plus calls. Also, the effective markup from this difference in billing methods was under $0.05 per call, less than AMI's billing expense per call.

4.3 Did AMI Fail any Requirement to Post Instructions?

CVC's complaint that AMI failed to post instructions on customer phones identifying the long distance carrier as required by Federal Communication Commission (FCC) rules is without merit and will be dismissed for failure to state a cause of action. CVC has not specified a Commission-jurisdictional requirement that AMI is alleged to have violated.

Findings of Fact

1. The California Attorney General has determined that an individual who is not a member of the State Bar of California may represent a party with respect to a formal proceeding before the Commission.

2. At the time of its February 24, 1995 letter to the ALJ, CVC had no reasonable basis for making accusations that AMI had unlawfully or criminally absconded with or kept tax revenue for its own benefit.

3. CVC's making of accusations of unlawful or criminal conduct against defendants in a letter to a Commission decisionmaker can reasonably be interpreted as an attempt to influence decisionmakers through prejudicial, off-the-record statements.

4. Because CVC filed this complaint to prevent AMI from taking CVC's customers, there is no basis for finding that CVC is a customer for purposes of the statutory program of intervenor compensation.

5. CVC is seeking to address its own narrow business interests in this case, and, at best, only incidentally seeks to vindicate any consumer or public interest.

6. CVC fails the economic interest test, and is not eligible for compensation from the Advocates Trust Fund.

7. The statutory exemption from status as a telephone corporation approved in *Murray v. Stanford,* 56 CPUC2d 583, is not so broad that all telephone service

directly or indirectly associated with the operation of a telephone system by a place of temporary accommodation for its guests or tenants is exempt from regulation by the Commission.

8. AMI's customers are real estate management companies that provide services to condominium owners or, occasionally, the unit owners themselves; the end-use callers who rent condominium units and place long distance calls through facilities provided by AMI are not AMI customers.

9. AMI has not billed anyone for 0 plus calls placed from rental units served by AMI; Com Systems or Tel-Trust rates, routes, and bills for such calls.

10. The systems and equipment provided by AMI allow unit owners to bypass or override the blocking of 1 plus calls for the few days or weeks of the year when they occupy their own units.

11. AMI rebilled for 1 plus calls placed by condominium owners from units served by AMI only during limited periods of time in 1993 and 1994, and only because it began incurring considerable expense for those calls due to the configuration of the equipment and the serving interexchange carrier's changed billing practices.

12. AMI's rebilling of 1 plus calls placed by condominium owners from units served by AMI in 1993 and 1994 was incidental to its primary business activity of providing call blocking equipment and related services to condominium and timeshare management companies or unit owners. This rebilling by AMI does not demonstrate a holding out to provide such service for compensation, as a business, to the public or any portion thereof.

13. CVC has not shown that AMI was a reseller of 0 plus calls, and AMI's incidental rebilling of 1 plus calls in 1993 and 1994 without markup does not demonstrate a holding out or dedication by AMI to serve the public or any portion thereof through the provision of such telephone service.

14. It was reasonable for AMI to assume that Com Systems billed AMI for all applicable taxes in the same manner that it billed its other customers.

15. AMI has paid Com Systems' bills in full, and there is no showing that AMI is responsible for the payment of taxes associated with the 1 plus calls that it billed to rental unit owners in 1993 and 1994.

16. In its complaint that AMI failed to post instructions on customer phones identifying the long distance carrier as required by FCC rules, CVC has not specified a Commission-jurisdictional requirement that AMI is alleged to have violated.

Conclusions of Law

1. CVC's making of accusations of unlawful or criminal conduct against defendants in a letter to a Commission decisionmaker constituted a violation of Rule 1, warranting sanctions.

2. As sanctions for violation of Rule 1, CVC should pay AMI the cost of preparing the motion for sanctions, not to exceed $2,000.00.

3. CVC is not eligible for intervenor compensation from any of the asserted sources of such compensation.

4. CVC has not brought forward evidence establishing that AMI is engaged in activities of a public utility telephone corporation subject to this Commission's jurisdiction.

5. AMI is not offering California intrastate telephone services to the public within the meaning and scope of Section 216.

6. The complaint in its entirety should be denied with prejudice.

O R D E R

IT IS ORDERED that:

1. The amended complaint of Coachella Valley Communications, Inc. (CVC) in Case (C.) 93-10-023 is denied with prejudice. CVC is entitled to no relief in this proceeding.

2. The motion of AMI Telecommunications Company of Nevada, Inc. (AMI) for sanctions against CVC is granted in part as provided herein. Within 20 days of the date that AMI files a statement of the direct costs incurred in the preparation of its March 9, 1995 motion for sanctions, and the costs of preparing the statement, CVC shall pay AMI the full amount of such costs, not to exceed $2,000.00, as sanctions for the disrespectful actions of CVC's representative in violation of Rule 1 of the Rules of Practice and Procedure.

3. CVC's requests for compensation for its participation in this case are denied.

4. All pending motions not previously resolved, or resolved elsewhere in this decision, are denied.

5. C.93-10-023 is closed.

This order is effective today.

Dated September 7, 2000, at San Francisco, California.

LORETTA M. LYNCH
President
HENRY M. DUQUE
JOSIAH L. NEEPER
RICHARD A. BILAS
CARL W. WOOD
Commissioners